Nos. 86-179 and 86-401

In the Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al.,

Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant,

v.

CHRISTINE J. AMOS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF AMICUS CURIAE

OF THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES, THE AMERICAN ASSOCIATION OF BIBLE COLLEGES, THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE CHRISTIAN COLLEGE COALITION, THE DEPARTMENT OF EDUCATION SERVICES OF THE CHURCH OF THE NAZARENE, THE DIVISION FOR COLLEGE AND UNIVERSITY SERVICES OF THE AMERICAN LUTHERAN CHURCH, AND THE TRANSNATIONAL ASSOCIATION OF CHRISTIAN SCHOOLS, IN SUPPORT OF THE APPELLANTS

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INTERESTS OF AMICI CURIAE

The American Association of Presidents of Independent Colleges and Universities is an organization comprised of 192 presidents of private institutions of higher education. The Association seeks to protect the institutional autonomy and integrity of independent colleges and universities, so that these institutions may fulfill their educational mission in a manner which they deem appropriate.

The American Association of Bible Colleges is a voluntary, non-profit corporation, international in membership, organized for the purpose of accrediting Bible Colleges in the United States and Canada. Approximately 110 Bible Colleges are members of the Association. The common purpose of these schools is to provide an educational environment in which students can obtain an education and training for Christian vocational pursuits. The members of the Association believe that the decision of the district court creates a dangerous precedent because their religious nature and purposes will be diluted if these colleges are compelled to hire employees who do not share their basic religious beliefs.

The American Association of Christian Schools is a voluntary, non-profit association comprised of 1,200 elementary and secondary schools with approximately 15,000 faculty members and 160,000 students. The member schools of the Association are committed to a Christian view of education, and for this reason these institutions feel themselves compelled on religious grounds to hire administrative, support and teaching personnel according to biblical standards.

The Christian College Coalition is an association of 75 colleges and universities which provide a distinctively religious context for the pursuit of a liberal education. All of the member institutions are seriously committed to the historic Christian faith, and they attempt to integrate a religious dimension into their educational endeavors.

The Department of Educational Services of the Church of the Nazarene endeavors to provide a quality education within a Christian environment in the Wesleyan tradition. These efforts are manifested in one seminary, one Bible College, and eight liberal art colleges with the common purpose of preparing professional and lay leadership for the Church. The emphasis in these institutions is on the historical, literary, practical and devotional study of the Bible, and on moral education and instruction in the holiness ethic and life-style.

The Division for College and University Services of the American Lutheran Church supports and serves 12 colleges and 1 high school of The American Lutheran Church ("the ALC"), a Minnesota Nonprofit Corporation and a religious denomination with member churches in 48 states, and one college affiliated with The Lutheran Church in America ("the LCA"). In addition, the Division provides a ministry to public universities and certain other colleges through National Lutheran Campus Ministry, a cooperative agency of the ALC, the LCA, and the Association of Evangelical Lutheran Churches; this campus ministry touches more than 300 college and university campuses across the country. The colleges and universities of the ALC continue to be the church in mission in higher education. They find in the church their historical moorings, a source of their life, and reason for being, without which they cannot live. Through its colleges the church provides environments and opportunities for the development of a sense of Christian vocation, of responsible discipleship, and of reasoned and critical participation in the structures of society. The church finds in its colleges resources by which to interpret and criticize itself and its mission. To fulfill these functions the colleges combine the values of rigorous academic life and personal religious commitment in a self-conscious, explicit and critical fashion. A church-related college, seeing the created order as one of God's gifts to be cherished and preserved rather than a commodity to be despoiled, aims to lead persons to a sense of awe and appreciation and to practices of nurture and care. The ALC colleges hope to educate students toward a sense of vocation that brings healing and wholeness to the world.

The Transnational Association of Christian Schools is a voluntary, non-profit organization comprised of 12 colleges or universities. The Association operates on the conviction that the total campus environment reflects their Christian commitment, which comes from their firm belief in the inerrancy and authority of the Bible, and which must be nurtured by those who share this belief.

This amicus brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

I.

THIS COURT SHOULD BE DISCRIMINATING ABOUT DISCRIMINATION. THIS CASE DOES NOT INVOLVE ANY DISCRIMINATION BY A SECULAR EMPLOYER ON THE BASIS OF RACE OR SEX, NOR EVEN DISCRIMINATION BY A RELIGIOUS EMPLOYER ON THE BASIS OF RACE OR SEX, BUT PROTECTED ACTIVITY OF A RELIGIOUS BODY WHICH CHOOSES TO TAKE INTO ACCOUNT THE RELIGIOUS CONVICTIONS OF ITS OWN EMPLOYEES.

A. This Case Does Not Involve Forbidden Racial Discrimination In Employment.

B. This Case Does Not Involve Forbidden Gender-Based Discrimination In Employment.

C. This Case Involves Solely The Permissibility Of An Employment Practice Of Religious Preference By A Religious Body.

II.

THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN CHOOSING REASONABLE MEANS TO IMPLEMENT LEGITIMATE GOVERNMENTAL ENDS WHICH ARE THEMSELVES REQUIRED OR COMMENDED BY THE CONSTITUTION.

A. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because

Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Secure The Guarantees Of The Free Exercise Clause Without Transgressing The Requirements Of The Establishment Clause.

(i) The provisions in Title VII relating to religion reflect a comprehensive legislative scheme that has appropriately balanced competing economic interests of secular employers and the Free Exercise rights of religiously motivated employees of secular employers, as well as the Free Exercise rights of religious employers and the economic interests of secular job applicants.

(ii) The provisions in Title VII relating to religion do not offend the requirements of the Establishment Clause.

B. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Effectuate The Constitutional Rights Of These Schools To Associational And Academic Freedom.

(i) Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

(ii) Congress may accommodate the right of religiously affiliated colleges and universities,

no less than that of public and independent institutions of higher education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

ARGUMENT

I.

THIS COURT SHOULD BE DISCRIMINATING ABOUT DISCRIMINATION. THIS CASE DOES NOT INVOLVE ANY DISCRIMINATION BY A SECULAR EMPLOYER ON THE BASIS OF RACE OR SEX, NOR EVEN DISCRIMINATION BY A RELIGIOUS EMPLOYER ON THE BASIS OF RACE OR SEX, BUT PROTECTED ACTIVITY OF A RELIGIOUS BODY WHICH CHOOSES TO TAKE INTO ACCOUNT THE RELIGIOUS CONVICTIONS OF ITS OWN EMPLOYEES.

As this Court has taught repeatedly, not all forms of discrimination are constitutionally proscribed. In *McGowan v. Maryland*, 366 U.S. 420 (1961), for example, this Court unanimously rejected the claim that the Maryland Sunday closing law violated the requirements of the Equal Protection Clause. In *McGowan* Chief Justice Warren wrote: "This Court has held that the 14th Amendment permits the States a wide scope of discretion in enacting laws which affect some group of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 425. Amici demonstrate in the remainder of this brief the rationality of the statutory scheme enacted by Congress and improvidently invalidated by the district court. As in *McGowan*, the record here "is barren of any indication that this apparently rational basis does not exist, [or] that the statutory distinctions are invidious. . . ." *Id.* at 426. The standards developed by this Court for Equal Protection

analysis, then, require the judiciary to make appropriate distinctions about the very concept of discrimination.[1]

In 1972 Congress made a deliberate and reflective statutory determination that religious employers may take into account the religious convictions (or lack of them) of their own employees without thereby offending the Equal Protection requirements of the fifth amendment Due Process Clause which are effectuated in the Civil Rights Act of 1964 [hereinafter, Civil Rights Act]. Amici argue in Part II of this brief that this congressional determination is entitled to considerable judicial deference because, far from acting irrationally or with an intent to promote invidious discrimination in the 1972 amendments to the Civil Rights Act, Congress sought to secure in this legislation values which are themselves required or commended by the constitution.

In order to underscore the need to be discriminating about discrimination, Amici refer throughout this brief to *religious preference* rather than to *religious discrimination* when describing the practice of a religious employer taking into account the religious convictions of its own employees. Amici readily concede that such a practice would be invidiously

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[1]Focusing on the practices of secular employers, a recent publication of the United States Commission on Civil Rights notes the following differences among cases involving discrimination on the basis of race, sex and religion: "Most religious discrimination cases . . . involve interests, dynamics, and problems not present in race or sex cases. To begin with, the interests that those affected are seeking to protect in race and sex cases are different from those at stake in religious discrimination cases. In race and sex cases complainants assert a constitutionally protected right not to be treated differently on account of such status, whereas complainants in religious discrimination cases generally claim that the uniform application of neutral rules impinges on a constitutionally protected right to be different. In the former case the 14th amendment is the ultimate source of constitutional protection, while in the latter instance 1st amendment rights are also implicated." U.S. Comm. on Civil Rights, *Religion in the Constitution: A Delicate Balance* 41 (1983); and see U.S. Comm. on Civil Rights, *Religious Discrimination: A Neglected Issue* (1979).

discriminatory if engaged in by the government itself or by a private secular employer, but argue in this brief that preference for a religiously motivated employee asserted by a bona fide religious organization does not constitute invidious discrimination at all, but is permissible accommodation of religious freedom protected under the first amendment. See McConnell, *Accommodation of Religion*, 1985 Sup.Ct. Rev. 1.

As is suggested in the report of the United States Civil Rights Commission cited in note 1, *supra*, this conclusion is buttressed by the text of the constitution itself. The first amendment affirmatively protects the free exercise of religion. By contrast, racial discrimination by the government and in many instances by private parties not only does not have any textual support in the constitution, but is positively interdicted by the clear commands of the thirteenth, fourteenth and fifteenth amendments as well as by a series of civil rights statutes enacted under the enforcement provisions of these amendments. Although the history immediately surrounding the adoption of the fourteenth amendment does not suggest much solicitude for gender-based discrimination, see, e.g., *Bradwell v. Illinois*, 16 Wall. (83 U.S.) 130 (1873), *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873), the subsequent enactment of the nineteenth amendment manifested the will of this country that irrational discrimination on the basis of sex is similarly impermissible.[2] Hence the insistence in this brief on the term "religious

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[2]This Court has, of course, clarified that gender-based discrimination by the federal government which is no more than "romantic paternalism" and which in practical effect puts women "not on a pedestal, but in a cage," is proscribed by the equal protection component of the fifth Amendment. *Frontiero v. Richardson*, 411 U.S. 677 (1973). And it has articulated a higher standard of judicial review than that specified in *McGowan v. Maryland*, *supra*, for cases involving an equal protection challenge to state legislation involving sex discrimination. *Craig v. Boren*, 429 U.S. 190 (1976). See also *Rostker v. Goldberg*, 453 U.S. 57 (1981) (applying heightened *Craig* standard to federal legislation).

preference" rather than "religious discrimination" is more than a linguistic nicety. It is a necessary mode of indicating the difference between legitimate exercise of a constitutionally protected right by a religious body and invidious discrimination on the basis of race or sex.

A. This Case Does Not Involve Forbidden Racial Discrimination In Employment.

Amici readily acknowledge that under the 1972 amendments to the Civil Rights Act there is no statutory ground for a religious employer to assert that it is immune from Title VII litigation if it engages in forbidden racial discrimination. A national study of administrators of religiously affiliated colleges and universities disclosed, moreover, that the set of facts confronted in *Bob Jones University v. United States*, 461 U.S. 574 (1983), is probably epiphenomenal, for none of the respondents in this survey maintained an employment policy of racial discrimination. See E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 33 (1982).

In any event, *Bob Jones University, supra,* has laid to rest the general proposition that the Free Exercise Clause affords absolute protection to tax-exempt, religiously affiliated schools which discriminate on the basis of race. 461 U.S. at 602-604. More to the point, *Bob Jones University* is wholly inapplicable to the instant case, which does not involve any allegation of unlawful racial discrimination on the part of the church Appellant. The important goals of Congress in seeking to eradicate the vestiges of racial discrimination in employment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), are simply not at issue in this case.

B. This Case Does Not Involve Forbidden Gender-Based Discrimination In Employment.

Amici likewise acknowledge that under the 1972 amendments to the Civil Rights Act there is no statutory ground for a religious employer to assert that it is immune from

Title VII litigation if it engages in forbidden gender-based discrimination in employment.[3]

The same national study referred to above, moreover, likewise disclosed that administrators of religiously affiliated colleges and universities do not generally maintain an employment policy of gender-based discrimination that could be arguably defended on free exercise grounds. See E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 33 (1982). It is, moreover, highly significant that the record in the leading case involving federal regulation of these colleges and universities, *Grove City College v. Bell*, 465 U.S. 555 (1984) is without any showing whatever that the college in question had committed any act of unlawful sex discrimination. *Id.* at 578-579 (Powell, J., concurring). More to the point, *Grove City College* is wholly inapplicable to the instant case, which does not involve any allegation of unlawful gender-based discrimination on the part of the church Appellant. The important goals of Congress in seeking to eradicate the vestiges of irrational sex discrimination in employment, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), are simply not at issue in this case.

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[3]Relying on the legislative history surrounding the 1972 amendments to Title VII, lower federal courts have declined to grant absolute immunity to religious organizations and religiously affiliated schools charged under Title VII with unlawful sex discrimination. See, e.g., *Rayburn v. General Conference of Seventh-day Adventists*, 772 F. 2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986); *EEOC v. Pacific Press Pub. Assn.*, 676 F. 2d 1272 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F. 2d 477 (5th Cir. 1980). A much closer question would be presented if the government were to attempt to use the federal civil rights laws to alter the doctrinal convictions of a religious body with respect to gender roles in its ministry. See, e.g., *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). In any event, these cases do not control the instant case, which does not involve any allegation of unlawful discrimination on the basis of sex.

C. This Case Involves Solely The Permissibility Of An Employment Practice Of Religious Preference By A Religious Body.

This case does not involve invidious discrimination by a secular employer on the basis of race or sex, nor even discrimination by a religious employer on the basis of race or sex. Because the record in this case is devoid of any colorable claim of improper discrimination on the basis either of race or sex, this Court should not rely on any of its decisions involving those prohibited categories of employment discrimination.

What this case does involve is solely the freedom of a religious body which chooses to take into account the religious convictions of its own employees. The national study of administrators of religiously affiliated colleges and universities referred to above disclosed considerable diversity among the respondents as to their actual practices involving religious preference in employment. E. Gaffney and P. Moots, *Government and Campus* 32-39 (1982). It is apparent from this study that not all church-related schools choose on educational policy grounds to take into account the religious convictions of their employees, or at least not in all employment positions.

Various religious educators have articulated a rationale for religious preference differently. For example, at a 1976 conference in Washington, D.C., the spokesman for Saint Olaf College in Northfield, Minnesota, stressed the importance of the relationship between that college and the American Lutheran Church; and he concluded: "Most importantly of all, we hire people who are committed to [the religious values identified with Lutheran Christianity]. All the programs and money in the world cannot help us achieve our stated ideals unless most of our faculty and administration embrace them out of conviction. When we hire, we try to hire the most capable chemists, artists or deans we can find; but we hire only those who convince us that they believe in our distinctness as a college of the Church, and who

persuade us that they cherish our ideals even if they don't share our religious and ethnic heritage." As cited in E. Gaffney and P. Moots, *id.* at 41. The distinguished Catholic educator, James Tunstead Burtchaell, C.S.C., stated the religious preference policy of the University of Notre Dame as follows: "At Notre Dame we have no task more important than to recruit and invite into our midst men and women who, beyond their being rigorously given over to the profession of learning, are likewise dedicated to a life of religious belief. If we are to be a Christian University, we must have a critical mass of Christian teachers. If Notre Dame is to remain Catholic, the only institutional way for assuring this is to secure a faculty with predominant representation of committed and articulate believers who purposefully seek the comradeship of others to weave their faith into the full fabric of their intellectual life." As cited *id.*

Other religious educators, reflected primarily among the Amici by member institutions of the American Association of Bible Colleges and the Christian College Coalition, would insist on the need to take into account the religious convictions of their employees in all of their employment decisions. They do so not out of any invidious intent or purpose to inflict economic harm on another, see *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), but because in their view all of the employees at a Christian school are or should be engaged in a common effort to enable young men and women to integrate fully the Christian faith with all dimensions of their study, their work, and their life. For example, Dr. Hudson Taylor Armerding, who served as President of Wheaton College from 1965 to 1982 stated recently: "The specific philosophy and goals of an evangelical Christian college are not simply enunciated in the classroom, but they are demonstrated throughout the whole life of the institution. Education includes the interaction of students with all college personnel (not just faculty) so that regardless of who a student interacts with, there will be a consistent transmission of a spiritual ideal. In surveys of Wheaton

College alumni conducted 10-20 years after graduation, we found that students do not remember the content of courses nearly as much as they remember interactions with people. The quality of individuals on campus is essential to the ministry of the college. To interject uncommitted individuals into non-faculty positions on the basis that they are not teaching the Bible does not recognize the essential mission or fellowship of an evangelical Christian college." Affidavit of Dr. Hudson Taylor Armerding, *Seattle Pacific University v. Haas*, W. D. Wash., No. C84-1787.[4]

The reality of diversity in perspectives among religious educators, moreover, does not support the conclusion that no church-related school may ever take into account the religious convictions of its employees without thereby violating the Civil Rights Act, for that would have the effect of imposing on church-related schools the very uniformity in matters of religious choice which both of the Religion Clauses militate against. Nor, as the district court would have it, does it follow that a bright line should be drawn between those jobs which the *government* deems (presumably on secular grounds) to be "religious" and those which the government deems to be "secular," for that is to ignore the central value of religious autonomy secured in the Religion Clauses. The point of the first amendment is that this kind of line-drawing is to be done, if at all, by religious bodies themselves rather than by the government. See, e.g., Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981).

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[4]A copy of this affidavit has been served on the parties, and has been filed with the Clerk and the Librarian of this Court.

II.

THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN CHOOSING REASONABLE MEANS TO IMPLEMENT LEGITIMATE GOVERNMENTAL ENDS WHICH ARE THEMSELVES COMMENDED OR REQUIRED BY THE CONSTITUTION.

As is obvious from the fact the district court chose to invalidate an Act of Congress, the legislative branch did not choose to draw a bright line between the "religious" and the "secular" activities of a religious organization. To the contrary, in the 1972 amendments Congress drew the lines in such a way as to maximize freedom of choice for religious bodies without attempting to endorse or support any religious body in preference to another. That legislative determination is entitled to considerable deference from this Court because the accommodation of religion which the Congress sought to achieve is reasonable and plainly within its constitutional authority. As Justice O'Connor stated last Term: "Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances *may voluntarily choose* to exempt religious observers without violating the Establishment Clause." *Wallace v. Jaffree*, 472 U.S. ___, 105 S.Ct. 2479, 2504 (O'Connor, J., concurring) (1985) (emphasis added); and see *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). See also McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

A. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judg-

ment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Secure The Guarantees Of The Free Exercise Clause Without Transgressing The Requirements Of The Establishment Clause.

As *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), teaches, this Court is not powerless to invalidate an Act of Congress which it deems to be violative of the Constitution. But it is instructive that since *Marbury* was decided in 1803, only seven Acts of Congress have been invalidated under the first amendment.[5] Of these seven cases, only two, *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Aquilar v. Felton*, 473 U.S. __ (1985) involved the Establishment Clause. This Court has never invalidated an Act of Congress on the ground that the Congress erred in attempting to accommodate the sensitive needs of religious bodies deemed by Congress to be protected under the Free Exercise Clause.

In the entire history of the republic a little over a hundred federal laws have been invalidated by this Court in whole or in part.[6] By contrast, this Court has invalidated over a thousand state constitutional and statutory provisions and municipal ordinances.[7]

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[5] *Aquilar v. Felton*, 473 U.S. __ (1985); *Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Schact v. United States*, 398 U.S. 58 (1970); *United States v. Robel*, 389 U.S. 258 (1967); and *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[6] Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* 1597-1619 (1973), and 1978 Supplement S272-S274 (1979) (listing all Acts of Congress held to be unconstitutional). But see *INS v. Chadha*, 462 U.S. 919 (1983) (White, J., dissenting) (listing Acts of Congress cast in constitutional doubt by ruling on Presentment Clause).

[7] See Congressional Research Service, *The Constitution*, *supra* note 6, at 1621-1785, and Supplement at S276-S293.

The sheer disproportion between invalidation of Acts of Congress and of state constitutional provisions and legislative enactments cannot be explained away as a failure of nerve or as a merely self-protective instinct on the part of this Court. On the contrary, it reflects several themes fundamental to American constitutional jurisprudence. First, this empirical record of judicial behavior reflects a deference to constitutional determinations of the Congress as a coordinate and equal branch of government. Such deference does not, of course, strip this Court of the power to nullify an Act of Congress when it is found to violate the no-establishment principle. But the very fact that this Court has seen fit to do so only twice, *Tilton v. Richardson, supra,* and *Aquilar v. Felton, supra,* supports the view that a more deferential standard obtains with respect to federal legislation than with respect to state legislation, even where federal and state statutes bear on the same general theme. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (distinguishing the Connecticut Sunday closing law from § 701(j) of the Civil Rights Act of 1964, requiring employers to make reasonable accommodations of the religious practices of employees).

Second, this Court has since 1937 shown considerable deference to the policy determinations of the Congress predicated upon its plenary power under the Commerce Clause. See, e.g., *Russell v. United States*, 471 U.S. 858 (1985); *United States v. Enmons*, 410 U.S. 396 (1973); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 307-313 (1981) (Rehnquist, J., concurring); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Katzenbach v. McClung* 279 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

It is late in the day for this Court to reassert judicial authority to rewrite the comprehensive legislative scheme contemplated by Congress in enacting the Civil Rights Act of 1964 and in adopting amendments to that landmark

legislation in 1972. To the contrary, the appropriate standard of judicial scrutiny of the provision of Title VII challenged in this litigation is that articulated by Chief Justice Marshall long ago in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819): "The [Necessary and Proper Clause] . . . cannot be construed to restrain the powers of Congress or to impair *the right of the legislature to exercise its best judgment in the selection of measures,* to carry into execution the constitutional powers of the government." *Id.* at 420; see also at 415, 419. (Emphasis added).

(i) The provisions in Title VII relating to religion reflect a comprehensive legislative scheme that has appropriately balanced the competing economic interests of secular employers and the Free Exercise rights of religiously motivated employees of secular employers, as well as the competing Free Exercise rights of religious employers and the economic interests of secular job applicants.

As amended in 1972, Title VII represents a comprehensive legislative attempt to balance a variety of interests which Congress sought either to regulate or to deregulate and leave free of governmental regulation. In the statutory definition of the term "religion," found in § 701 (j) of the Act, Congress intended to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious beliefs and practices of its employees. As is indicated below, this Court has never ruled that it is constitutionally impermissible for Congress to strike the balance in favor of religiously motivated employees of secular employers.

In § 702, as amended in 1972, Congress clearly intended to allow religious bodies and religiously affiliated schools the freedom to take into account the religious convictions (or lack of them) of their employees. The balance struck by Congress was not that this religious freedom was to be protected under the statute only with respect to those activities

of a religious body or a religiously affiliated school which are thought to be "religious" by the government. To the contrary, in accepting the Ervin Amendment, Congress expressly chose to afford statutory protection to religious employers, allowing them to maintain a policy of religious preference with respect to all of their activities.[8] This provision, challenged directly in the instant litigation on a record clearly involving not simply a discharge on secular grounds but sensitive matters of church discipline, has never been the focus of a ruling by this Court.[9]

In 1964 Congress also enacted in § 703(e)(1) a provision that allows any employer to take an individual's religion into account if that factor is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." The Report of the House Judiciary Committee suggests that this provision is "very limited" and is available to an employer only in "those rare situations where religion or national origin is a bona fide occupational qualification." H.R. Rep. No. 88, 88th Cong., 1st Sess. (1963). Discussing the BFOQ exception in the context of sex discrimination, this Court has accepted the view that "the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); see also *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273, 279-280 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

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[8]The district court set out much of the legislative history of § 702 as amended in 1972. App. 25a-39a. For a concise treatment of the legislative history of all three provisions in Title VII relating to religiously affiliated schools, see P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* 40-54 (1979).

[9]Two lower federal courts have cast doubt in dictum on the constitutionality of § 702. *King's Garden, Inc. v. FCC*, 498 F.2d 51, 53 (D.C.Cir.), *cert. denied*, 419 U.S. 996 (1974); and *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass 1983).

For the very reason that the BFOQ exception is narrow, the other provisions of Title VII[10] relating to religious preference should not be construed in such a way as to telescope all permissible accommodation of the interests of religious employers down to the limits of rationality articulated in § 703(e)(1). But this is the very effect of the tripartite test devised by the district court for determinations of when the protection of § 702 should be afforded to a religious employer. In the guise of constitutional interpretation, the district court has in reality indulged in the rewriting of Title VII in such a way as to allow a religious employer to maintain a policy of religious preference only when it would otherwise qualify for the BFOQ exception.

(ii) The provisions in Title VII relating to religion do not offend the requirements of the Establishment Clause.

In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977) this Court had the opportunity to rule directly on the constitutionality of § 701(j). It did not find the congressional enactment impermissible, but only ruled that the employer was not bound to suffer undue hardship in

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[10]In 1964 Congress also enacted in § 703(e)(2) a provision which allows religiously affiliated schools to maintain a policy of religious preference if the school meets either of two statutory criteria: (a) support, control, or management by a religious body, or (b) orientation of the curriculum toward the "propagation of a particular religion." For a discussion of the inadequacy of these statutory criteria in protecting the legitimate educational policy interests of religiously affiliated schools, see E. Gaffney and P. Moots, *Government and Campus* 48-49, 75-80 (1982). Appellees argue that § 703(e)(2) adequately protects the interests of religiously affiliated schools. This argument is without merit if only because of the straitjacket which Appellees have already persuaded the district court to impose on § 702. It takes little imagination to assume that on a later day other litigants with the same ideological conviction of the Appellees may be found to argue for similar constrictions on § 703(e)(2).

accommodating the religious interests of its employees.[11] In *Estate of Thornton v. Calder, supra.*, two members of this Court indicated in dictum their view that this provision does not violate the Establishment Clause. 472 U.S. 703, 711 (O'Connor, J., concurring). Most recently, in *Ansonia Bd. of Education v. Philbrook*, No. 85-495, this Court did not so much as intimate any doubt about the constitutionality of § 701(j). In short, whenever this Court has had an opportunity to rule or to comment on § 701(j), it has favored the balance struck by Congress in this provision as a reasonable accommodation of religion.

Analogously, the balance struck by Congress in § 702 is likewise permissible under the Establishment Clause, either under the tripartite test developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or under a test which relies primarily on the original intent of the framers of the Establishment Clause, as was suggested in *Marsh v. Chambers*, 463 U.S. 783 (1983).

Under the *Lemon* test, § 702 clearly was enacted for a legitimate secular purpose, and does not entangle the government excessively in religious matters. App. at 25a-41a, and 70a-75a. Ironically, the requisite secularity was found by the district court to inhere precisely in the very distancing of the government from excessive entanglement in religious matters which Congress sought to achieve in the 1972

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[11] After its decision in *Hardison* this Court has repeatedly declined to review the decisions of Courts of Appeal, all of which have sustained § 701(j) against constitutional attack. *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982), 571 F.2d 338 (6th Cir. 1978); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 102 S.Ct. 587 (1981); *Nottleson v. Smith Steelworkers*, 643 F.2d 445 (7th Cir.), *cert. denied*, 102 S.Ct. 587 (1981); *Anderson v. General Dynamics*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1006 (1982); 589 F.2d 397 (9th Cir. 1978, *cert. denied*, 442 U.S. 921 (1979); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 843 (1979); and *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

amendment by allowing religious employers broad freedom to maintain a policy of religious preference with respect to all their activities. Nonetheless, the district court concluded that as applied to "secular" activities, § 702 has the impermissible primary effect of advancing religion "by granting religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices." App. at 70a. The conceptual error of the district court is manifest almost in the very statement of its conclusion, for under the analysis adopted by the district court virtually any accommodation of religion which does not measure up to a secular standard of rationality would be a violation of the Establishment Clause. This is the very error corrected by this Court in *Thomas v. Review Bd.*, 450 U.S. 707 (1981). It should be clear that religious bodies need the freedom to engage in activities which might seem secular to secular evaluators, but which in the eyes of the members of the religious body are an integral part of their religious mission in the world.[12] As

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[12]With vicious circularity the district court in the instant case concedes quite broadly that "religious authority necessarily pervades all the activities in which a religious organization engages" App. 72a, a proposition firmly established in this record with respect to the religious tenets of the Mormons relating to physical well-being, App. 11a-13a, 71a-72a, and which could easily be replicated in other religious traditions which, for example, give special attention to dietary requirements. Nevertheless, rather than reaching the obvious conclusion that Congress might reasonably agree with this proposition, the district court felt compelled by the Establishment Clause to inquire further into the substantiality of the relationship between a particular activity of a religious body and that body's religious rituals or tenets. *Id.* at 11a. On this test, he ruled that the activities of the Appellant Mormon Church in conducting Deseret are not religious, *id.* at 18a, without offering any explanation why activities which on his own view, let alone that of the Appellant chruch, are "pervade[d]" by religious authority are not by that very fact religious activities protected under the Free Exercise Clause. A year later the district court concluded that Deseret Industries, which terminated the employment of the lead Appellee, Christine Amos, and which operates a Goodwill-type

the Court of Appeals stated in *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979): "the value judgments and sense of priorities of the regulator and the regulatee are likely to be grounded in wholly different concerns." *Id.* at 77. For this reason this Court should again clarify that in our constitutional order the delicate task of defining religion is not to be undertaken solely according to the secular lights of those who are unfamiliar with, or even hostile to, religious experience and value. See F. Schleiermacher, *On Religion: Speeches to Its Cultured Despisers* (1799).

Under a more flexible approach to Establishment Clause matters adopted by this Court in *Marsh v. Chambers*, 463 U.S. 483 (1983), a long-standing historical practice should not be invalidated except for some compelling justification which necessitates that result. The district court did not undertake any analysis of § 702 under this standard of review. When analyzed in this perspective, § 702 clearly passes muster for two reasons. First, one of the obnoxious practices indulged in by colonial governments had been the licensing and regulation of dissenting preachers and religious teachers. The framers of the first amendment clearly intended to deny such regulatory power to the new national government. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964). Second, education in this country from the colonial period until well into the nineteenth century was predominantly, indeed virtually exclusively, the province of the church rather than the state. See, e.g., L. Cremin, *American Education: The Colonial Experience, 1607-1783* (1970). Third, during this period, which includes the period of the adoption and ratification of the first amendment, there was no attempt whatever by the federal government to define with precision which

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thrift store open to the general public, is a protected "religious activity" of the Appellant church, and therefore did not even discuss the standard which the court had used to reach an opposite conclusion with respect to Deseret. App. 105a-116a.

activities of religious bodies are "religious" in character and which are "secular." In adopting the deregulatory Ervin amendment in 1972, Congress was thus returning the country to a long-standing historical practice which predated not only the 1964 Civil Rights Act, but also the adoption of the first amendment itself: the practice of letting a religious body choose on religious grounds those persons whom it prefers to employ to carry out its religious mission, however it chooses to define that mission on religious rather than secular grounds.[13]

Although the district court was of the view that "the principal [sic] of accommodation espoused in *Walz* has little relevance here," App. 67a, this principle is in the view of the Amici at the heart of a correct assessment of § 702. There may be a point where in attempting to accommodate religion, Congress or a State legislature crosses over the limits imposed by the Establishment Clause, but that point was not reached in § 702, which confers no "direct and immediate" economic benefit from public funds to any religious body or to their schools, which surely does not prefer any religious group over another, and which does not involve the government in active support of any religious viewpoint. See *Committee for Public Education and Religious Liberty v. Nyquist*, 413

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[13]In *King's Garden v. FCC*, 498 F.2d 51, *supra*, the Court of Appeals worried about an unfair commercial advantage which a hypothetical religious body might gain over secular competitors if it were, for example, to take over the operation of a professional football team. Because it is not transparently clear that the recruitment of the Redskins solely on the basis of their denominational affiliation would lead to victory against the Detroit Lions on the playing field (any more than it did in the Roman Colosseum), perhaps it is wiser not to worry about such "imaginable but totally implausible evils" *Wolman v. Walter*, 433 U.S. 229, 260, note 6 (1977) (Marshall, J., concurring and dissenting) until they actually occur. In addition, the commercial advantage, if any, of a religious body which engages in a wholly secular activity is offset by the requirement that the body pay federal income tax on unrelated business income. I.R.C. §§ 511-513.

U.S. 756 (1973); and *Wallace v. Jaffree*, 472 U.S. ___, 105 S. Ct. 2479, 2504 (1985) (O'Connor, J., concurring). The only "support" of religion that can seriously be thought to flow from § 702 is the wholly permissible goal of leaving religious bodies free of governmental regulation of their employment decisions which implicate religious convictions.

Accommodation of religion is not to be thought of as prohibited by the Establishment Clause. As Professor Tribe has suggested: "there are necessary relationships between government and religion; government cannot be indifferent to religion in American life; far from being hostile or even truly indifferent, it may, and sometimes even must, accommodate its institutions and programs to the religious interests of the people." L. Tribe, *American Constitutional Law* 822 (1978); and see Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311 (1986). However wide the channel between permissible accommodation of religion and forbidden establishment, see *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting), religious bodies and religiously affiliated schools will not be able to navigate between this Scylla and Charybdis if Congress itself is not allowed much discretion to chart straits thought by the judiciary to be perilous. To the contrary, because Congress is well equipped institutionally to engage in the balancing of interests that clearly merit protection under the Free Exercise Clause, this Court should trust that for the most part Congress will discharge its legislative task with appropriate respect for the Constitution that they are duty-bound by their oath of office to uphold. See L. Tribe, *American Constitutional Law* 13-14 (1978). As Chief Justice Marshall stated with respect to state legislation sustained in *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87 (1809), "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be construed as void." *Id.* at 128.

This conclusion is supported by the text of the first amendment, which prohibits the prohibition of free exercise of religion. Since Congress is required to permit free exercise, its efforts to do so should not be construed as prohibited support of religion. To the contrary, this Court should adopt the sensible conclusion that what the Congress deems *necessary* to effectuate the Free Exercise Clause is for that very reason constitutionally *permitted*.

This Court should sustain § 702 because Congress has broad latitude in choosing means which it deems necessary and proper to secure the guarantees of the Free Exercise Clause without transgressing the requirements of the Establishment Clause.

B. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account the Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Effectuate The Constitutional Rights Of These Schools To Associational And Academic Freedom.

It is well settled that in reviewing an Act of Congress, courts should sustain the legislation if it is a legitimate exercise of any power granted to the Congress. Although the Necessary and Proper Clause is not an independent ground of congressional authority, when it is coupled with the duty of Members of Congress to uphold other freedoms which are constitutionally protected, legislation enacted on that basis is entitled to judicial deference.

(i) Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

Although freedom of association is not expressly protected in so many words in the text of the constitution, it is now beyond cavil that the first amendment protects the civil liberties not simply of isolated atoms, but also of persons working in concert for a common end. The right of associational freedom is now secured not only for civil rights organizations, *NAACP v. Alabama,* 357 U.S. 449 (1958), but also for labor unions, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), and political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976). All these cases stand for the proposition that people have "a right to join with others to pursue goals independently protected by the first amendment." L. Tribe, *American Constitutional Law* 702 (1978). The very fact, moreover, that a religious body is a *community* of believers requires the conclusion that religious bodies enjoy at least the same constitutional protection against deprivation of their associational freedom as is enjoyed by secular groups or associations. *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring). This Court should sustain § 702 because Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

(ii) Congress may accommodate the right of religiously affiliated colleges and universities, no less than that of public and independent institutions of higher education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

Like associational freedom, academic freedom is not expressly protected in the text of the constitution, but is now thought fundamental to the safeguarding of other first amendment values, including freedom of speech. See, e.g., *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Among the essential rights secured to an educational institution under the rubric of academic freedom is the right to choose on appropriate educational policy grounds those who teach in the institution and how they shall teach the particular message which that institution chooses to transmit. See *Sweezy, supra*, 354 U.S. at 261-263 (Frankfurter, J., concurring). As was suggested at the outset of this brief, Amici concede that academic freedom may not be used as a cloak to cover employment practices in educational institutions which are discriminatory on the basis either of race or sex. Where, however, a nongovernmental educational institution is committed to handing on religious meaning and value as part of its educational mission, that choice is surely worthy of respect. And where, as the legislative history of Title VII so plainly supports, Congress attempted to effectuate its respect for the academic freedom of religiously affiliated schools by enacting § 702, see P. Moots and E. Gaffney, *Church and Campus, supra*, this Court should sustain that legislation because Congress may accommodate the right of religiously affiliated educational institutions, no less than that of their sister institutions in the public and independent sectors of education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

CONCLUSION

For the reasons stated above, Amici urge this Court to reverse the judgment of the district court.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 5, 1987, I served the within *Amicus Curiae Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 1987, at Los Angeles, California.

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